NOTE: THE UNDERAGE, THE "UNBORN," AND THE UNCONSTITUTIONAL: AN ANALYSIS OF THE CHILD CUSTODY PROTECTION ACT

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I. INTRODUCTION

The Child Custody Protection Act (CCPA), 2001 H.R. 476, is currently pending in the House of Representatives.[1] The Act would impose criminal penalties on any non-parent adult who transports a minor across state lines to receive an abortion, if that minor has not satisfied the parental consent or notification laws[2] in her home state. The Bill reads:

> Except as provided in subsection (B), whoever knowingly transports an individual who has not attained the age of 18 years across a state line, with the intent that such individual obtain an abortion, and thereby in fact abridges the right of a parent under a law requiring parental involvement in a minor's abortion decision, in force in the state where the individual resides, shall be fined under this title or imprisoned not more than one year, or both.[3]

Purportedly, this Bill would deter rapists and child molesters from forcing abortions on their kidnapped victims.[4] However, it would have the very real effect of preventing teenagers from seeking help, even from other

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[1] 107 Bill Tracking H.R. 476.

[2] Currently, thirty-two states have enforceable parental notification or consent statutes for minors seeking abortions. Ten other states have been enjoined by Attorneys General or courts from enforcing their statutes for lack of constitutionality. *See* The Guttmacher Report on Public Policy, Vol. 4, No. 6, December 2001. In this note, I do not distinguish between the two types of statutes, since the CCPA applies to both.

[3] 106 S. 661 (1999), Sec. 2431(a)(1).

[4] *See* 145 Cong. Rec. H. 5099, 5100 (daily ed. June 30, 1999).

family members. In fact, proponents of the Bill rejected an amendment that would have excluded grandparents from criminal sanctions.[5]

One might take several approaches in assessing the constitutionality of the CCPA; an initial instinct is to challenge the law under the "undue burden" standard articulated by the Supreme Court in Planned Parenthood of Southeastern Pennsylvania v. Casey.[6] Reliance on Casey would be misplaced, however, since the Court in that case specifically found that parental notification or consent laws themselves do not place an undue burden on a minor.[7] If laws requiring a minor to secure parental consent do not constitute an undue burden, it is extremely unlikely that the Court would find the minor's inability to be taken out of state in circumvention of those laws to compose one either.[8]

So, a different approach [than Casey] is needed, and I will argue that the CCPA would violate the Constitution in at least two clear and distinct ways. First, the Bill as written impermissibly burdens citizens' fundamental right to interstate travel, in violation of the Privileges and Immunities Clause of Article IV of the United States Constitution. Second, the law tramples on well-established notions of federalism and states' autonomy as applied to abortion. In our federal system, states have the right to develop their own abortion regulations within the bounds of Supreme Court abortion jurisprudence. Thus, a challenge to the CCPA need not risk the minefields of United States abortion law under the Constitution; instead, well grounded principles of the right to travel and the ideals of the division of power between the federal government and the states demonstrate the invalidity of the law.

This note will analyze the validity of the CCPA according to the law governing the right to travel and the requirements of federalism under the Constitution. Ultimately it will conclude that the CCPA is invalid on both counts. Part II of this note will address the state of the law around minors and abortion and will provide a brief background of the proposed legislation. Part III will apply the right to travel law to the Act. This inquiry boils down to the question of whether the Supreme Court's right to travel cases apply to federal laws. As I argue they do, the Bill immediately

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[5] *See* 145 Cong. Rec. H. 5099 (daily ed. June 30, 1999).

[6] 505 U.S. 833 (1992).

[7] *See id.* at 899. The court in Casey upheld precedent set in Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 510-19 (1990) stating that as long as a judicial bypass option was incorporated into the law in question, the Court would uphold the parental consent provision. *See* Casey, 505 U.S. at 899-900.

[8] In addition, the CCPA is a federal law, whereas the laws generally addressed by the Court in standard abortion cases have been state laws. *See*, e.g., Roe v. Wade, 410 U.S. 113 (1973) (invalidating a set of Texas abortion laws), and Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) (striking down Missouri's spousal consent provisions).

falls flat on this ground alone. Part IV will analyze how the Bill fares under the constitutional requirements of federalism. This requires answering two questions. First, could Congress pass a federal and uniform parental consent or notification law? If not, then the only way Congress could regulate minors' abortion to this extent is to legislate indirectly through the states. Thus the second question: does Congress have the authority, under current notions of federalism, to pass laws to help states enforce their laws outside of their own state boundaries? Even if the right to travel cases do not apply to Congress, and the federal government is given more constitutional leeway to regulate citizens than are the states, the answer to this last question will be sufficient to effectuate the downfall of the law.

II. THE CONTEXT OF THE CCPA

The Bill was first introduced by Senator Edmund Spencer Abraham, a Republican from Michigan, on February 12, 1998.[9] It was urged by members of that party that the law "will protect the most sacred bond that exists, that between every parent and their children [sic] . . . . We must also act to stop those who decide to play parent to our children . . . . [T]hese strangers smuggle children across State lines in order to circumvent a State's parental law on abortions."[10]

It is unclear from an empirical perspective why the Bill's sponsors[11] have chosen this moment in the history of abortion regulation to push for its passage. Since 1980, abortion rates among teenagers have declined steadily.[12] Fewer minors are becoming pregnant, and fewer pregnant teenagers are choosing to have abortions.[13] Not only is the incidence of abortion by minors decreasing, but sixty-one percent of minors who do have abortions do so with at least one parent's knowledge,[14] and most parents support their daughter's decision to have an abortion.[15]

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[9] 105 Bill Tracking S. 1645.

[10] 144 Cong. Rec. H. 4638 (daily ed. June 17, 1998) (Statement of Rep. Ros-Lehiten).

[11] The prime sponsors of the Bill are, in the House of Representatives, Rep. Ileana Ros-Lehtinen (R-Florida) (*see* 106 H.R. 1218, 106th Cong. (1999)) and in the Senate, Sen. Edmond Spencer Abraham (R-Michigan) (*see* 105 S. 1645, 105th Cong. (1998)).

[12] Alan Guttmacher Institute, http://www.agi-usa.org/pubs/fb_teen_sex.html (site last modified Dec. 1999).

[13] Gregg Easterbrook, It Almost Seems as Though Everything's Ok in the U.S.A.; Going by the Numbers, Life Here is Improving, The Orlando Sentinel, section G1, February 14, 1999.

[14] Alan Guttmacher Institute, *supra* note 12.

[15] *Id.* citing Henshaw SK and Kost K, Parental Involvement in Minors' Abortion Decisions, 24(5) Family Planning Perspectives, 196-207 & 213 (1992).

Even though the rate of teen abortion is declining many women and girls seeking the procedure must cross state lines.[16] Only fourteen percent of counties in the United States contain abortion providers.[17] This is the harsh reality that the CCPA exploits, and though people routinely cross state borders to avail themselves of another state's more favorable divorce laws or tax codes,[18] conservative members of Congress seek to prohibit minors from taking advantage of more lenient abortion regulations in neighboring states.

The CCPA regulates specifically only the travel of the person accompanying the pregnant minor.[19] It does not prohibit any conduct other than the travel, and the minor is subject to no penalties of her own under the law. It is possible that the law would be constitutional if its restrictions applied to the activities of minors only.[20] This suggests that limiting the Bill's restrictions to those who accompany minors was in large part motivated by political considerations. Proponents of the law sought to broaden its appeal by stating that its purpose is to prohibit rapists and child molesters from having access to abortions for their minor victims in other states.[21] It is obviously easier to secure support for a law with this

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[16] *See* Kevin McDermott, Bill Would Require Illinois Abortion Providers to Honor Parental Consent Laws of Other States: Missouri Girls Now Cross Line to Get Around Law, St. Louis Post Dispatch, January 26, 2001, at A1 (noting that according to the Illinois Department of Public Health reports that about fifteen percent of the 4,294 out-of-state residents who had abortions in Illinois in 1999 were seventeen or younger). In addition, nearly one in four women has to travel more than fifty miles to get an abortion. *See* Sharon Lerner, Mayor's Choice, Village Voice, January 15, 2002, Features at 45.

[17] Gina Kolata, As Abortion Rate Decreases, Clinics Compete for Patients, N.Y. Times, Dec. 30, 2000, at A1.

[18] *Id.*

[19] 106 S. 661 (1999).

[20] The activities of minors are subject to more regulation than those of adults. "We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing. . . . States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences. These rulings have been grounded in the recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." Belloti v. Baird, 443 U.S. 622, 634-635 (1979). *See also* Jennifer C. Friedman, Parental Notice in State Abortion Statutes: Filling the Gap in Constitutional Jurisprudence, 29 Colum. Human Rights L. Rev. 437, 443-445 (Spring, 1998) for a brief overview of the Supreme Court's determinations of the rights of minors. *See also* Benjamin C. Sasse, Curfew Laws, Freedom of Movement, and the Rights of Juveniles, 50 Case W. Res. 681 (Spring, 2000) for an explication of the right to travel as applied to minors specifically.

[21] *See* 145 Cong. Rec. H. 5099, 5100 (daily ed. June 30, 1999).

purported agenda than for one which simply seeks to limit the reproductive rights of teenage girls.

III. THE FUNDAMENTAL RIGHT TO TRAVEL

A. As Applied to the States

The principle of a right to travel predates the Constitution.[22] Article IV of the Articles of Confederation provided: "...[T]he free inhabitants of each of these States . . . shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state."[23] The right to travel freely among the states has clearly been of importance to our system of federalism since our country's creation, as the Supreme Court has regularly recognized.[24]

A significant body of law exists on the ability of states to curb their citizens' right to travel. The Supreme Court has often found such power to be restricted by the Privileges and Immunities Clause in Article IV of the Constitution.[25] The current leading case outlining the limits on the ability of the states to restrict the right to travel is Saenz v. Roe.[26] While the Supreme Court dealt, in that case, with a statute denying welfare benefits to newly arrived residents in California, the opinion discussed at length the three different guarantees afforded to citizens by the right to travel doctrine emerging out of the Privileges and Immunities Clause.[27] The prong

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[22] *See* Seth Kreimer, The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism, 67 N.Y.U. L. Rev. 451, 500 (1992).

[23] *Id.* citing Articles of Confederation art. IV (1777).

[24] *See, e.g.*, Corfield v. Coryell, 6 F.Cas. 546 (CCED Pa. 1823) (Washington, J., on circuit) ("fundamental" rights protected by the Privileges and Immunities Clause include "the right of a citizen of one state to pass through, or to reside in any other state") (*quoted in* Saenz v. Roe, 526 U.S. 489, 501 (1999); Paul v. Virginia, 75 U.S. 168 (1869) ("Without some provision . . . removing from citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists" (*quoted in* Saenz at 501-502). *See also* Shapiro v. Thompson, 394 U.S. 618 (1969) (a state can not enact residency requirements for welfare benefits for the purpose of discouraging needy people from moving to the state).

[25] U.S. Const. art. IV, §2, cl. 1. *See, e.g.*, Saenz v. Roe, 526 U.S. 489 (1999). Saenz was decided by a 7-2 majority, indicating an unusual point of agreement for this court. Justice Rehnquist was in the two justice minority in this case, as well as in Doe v. Bolton, 410 U.S. 179 (1973) and in Bigelow v. Virginia, 421 U.S. 809 (1975).

[26] Saenz, 526 U.S. 489.

[27] *See id. See* Peter H. Schuck, Citizenship in Federal Systems, 48 Am. J. Comp. L. 195, 223-25 (2000) for an analysis of Saenz.

applicable to our question is the second one articulated in the opinion, in which a state citizen "travels in other States, intending to return home at the end of his journey."[28] The Court noted that the Privileges and Immunities Clause of Article IV explicitly provides "important protections for noncitizens who enter a State . . . to procure medical services,"[29] and that any law that burdens the right to travel must be subject to strict scrutiny.[30]

In light of the ruling in Saenz, two earlier cases that construe the right to travel in the abortion context become relevant and should be reexamined. In Doe v. Bolton, the Court struck down a Georgia law that prohibited all clinic abortions except those for bona fide residents of the state.[31] The case is mentioned in Justice Stevens's Saenz opinion as an illustration of an instance in which the right to travel trumps state self-interest and in which in-state privileges must be granted to out-of-staters seeking medical attention.[32] With broad language, Justice Blackmun remarked that the Privileges and Immunities Clause of Article IV protects those who enter a state seeking medical care there, stating that a contrary holding would "mean that a State could limit to its own residents the general medical care available within its borders. This we could not approve."[33] Justice Blackmun makes no mention of the interests or laws of the woman's home state, but as the law existed in the pre-Roe[34] world, it can be inferred that many women seeking to take advantage of laws in pro-choice states were fleeing their more restrictive home jurisdictions. Thus, under Doe v. Bolton, State B could not prohibit such visits from residents of State A.

This is exactly the scenario that the CCPA attempts to undermine. The minor leaves her home state to seek an abortion in a new one. Under Doe v. Bolton, the receiving state cannot deny the minor the same access to an abortion it would extend to its own citizens. While the opinion says nothing of extending its holding to restricting federal power, the language is sweeping and deferential to travelers' rights. As the CCPA only aims to protect what would be, under Bolton, unconstitutional assertions of state

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[28] Saenz, 526 U.S. at 501. The other two instances in which the right to travel is implicated are the right to free interstate movement and the right of a new resident of a state to be treated as equal to current residents of the state. The last scenario is the one that ultimately led to the downfall of the law at issue in Saenz.

[29] *Id.* at 502 (citing Doe v. Bolton, 410 U.S. 179 (1973)).

[30] *See* Saenz, 526 U.S. at 499.

[31] *See* Doe v. Bolton, 410 U.S. at 200.

[32] *See* Saenz, 526 U.S. at 502.

[33] *Id.*

[34] Roe v. Wade, 410 U.S. 113 (1973). The two cases were decided on the same day.

power, it could not stand if passed by a state.[35] Again, the CCPA would allow a state to restrict its citizens' freedom in a way wholly inconsistent with the right to travel doctrine.[36]

The second of the abortion cases decided along these lines is Bigelow v. Virginia.[37] In dicta, Justice Blackmun went even further in that case, decided two years after Doe v. Bolton. In Bigelow, the Court overturned the conviction of a Virginia newspaper editor who published an advertisement for abortion services in New York on First Amendment grounds.[38] In its decision, the court commented that Virginia could not have regulated the services provided by New York physicians, nor could it prosecute its own citizens for procuring such services in New York.[39] This dictum in Bigelow seems to indicate that the right to travel includes the right to avail one's self of State B's laws without the fear of repercussions in State A.[40] Taken together with the holding in Bolton, Bigelow tells us

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[35] Only one state has introduced a bill providing that if a minor seeking an abortion in that state has not satisfied her home state requirements for consent or notification, she cannot be granted an abortion in that state. *See* IL H.B. 1862. It is extremely questionable whether, under the strict scrutiny demanded by Saenz and Bolton, this law if passed would be constitutional.

[36] Professor Lea Brilmayer proposes that Doe v. Bolton, 410 U.S. 179 (1973), is not dispositive of the issue of nonresident access to abortion services in a post-Roe world because today, a state might claim that its refusal to grant access was in deference to the laws of the woman's home state. *See* Colloquy: Extraterritorial Regulation of Abortion: Interstate Preemption: The Right to Travel, the Right to Life, and the Right to Die, 91 Mich. L. Rev. 873, 874 (1993). In light of Saenz's insistence on strict scrutiny for all state impingements on the right to travel, the strength of her suggestion is questionable. It is unlikely that a state could prove its own compelling interest in upholding the laws of a sister state. More importantly, this is not the scenario posited by the CCPA. The states that receive the minor are not interested in upholding the laws of the sister state, but rather in protecting their own laws and in exercising their own judgment and policy.

[37] 421 U.S. 809 (1975).

[38] *See Id.*

[39] *Id.* at 823.

[40] Professor Laurence H. Tribe comments on the ability of a home state to regulate the behavior of its citizens while traveling:

> In our federal structure, state jurisdiction is territorially defined in such a way that people may vote with their feet not only to make their homes in whichever state's demographic, political, or legal environment accords with their preferences, but also to travel on a transient basis to states whose legal systems they find more to their liking or more in accord with their needs at the time, in order to obtain while there the benefits of those legal systems. No state may enclose its citizens in a legal cage that keeps them subject to the state's rules of primary conduct.

Comment: Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future or Reveal the Structure of the Present?, 113 Harv. L. Rev. 110, 151-152.

that State B cannot refuse to provide abortions to a citizen of State A, and that State A cannot punish its own citizen for procuring one in State B.

B. As Applied to the Federal Government

These cases assert that there is an extremely limited context in which the states may regulate the travel of their citizens.[41] The question before us, then, is whether the same restrictions apply to the federal government, but there is little federal case law, and no recent Supreme Court decision, that speaks to it. An analysis of the right to travel opinions indicates that their language is broad enough to impose similar restrictions on federal legislation.[42] The principal question posed in each case is the extent of protection of *individual* rights, as well as state rights.[43] The conclusion in each is that absent a compelling state interest, the individual's right to travel (and to obtain an abortion per the laws of State B) remains protected.

Congress' most infamous attempt at regulating interstate travel was the Mann Act.[44] The Mann Act, originally titled the White Slave Traffic Act,[45] made it a felony knowingly to transport in interstate or foreign commerce or in the District of Columbia, "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose."[46]

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[41] While it is not of significant importance to this paper, the Commerce Clause provides another rationale for limiting individual states' ability to burden citizens' rights of interstate travel. As Professor Seth Kreimer frames it, "for state citizens who seek more hospitable jurisdictions in which to engage in morally-contested activities barred to them at home, the federal protection of interstate commerce offers shelter." Kreimer, *supra* note 22, at 488. Kreimer does not posit Congress's role, however, in limiting interstate choice. He states explicitly that he assumes for his article that no federal law will be passed, but that if one were, the issue of whether either the right to travel or the Privileges and Immunities Clause would bind Congress would arise. *Id.* at 451 n.5.

[42] Saenz also stands for the proposition that Congress does not have the power to authorize a state to violate the 14th Amendment's Equal Protection or Due Process Clauses. As we will see, the Court's current reading of the Commerce Clause would prohibit Congress from passing a uniform parental notification law, so the issue is not only whether Congress could limit rights of citizens that the states are powerless to limit, but also whether Congress can strip the state of its right to decide and enforce policy on the issue of parental notification.

[43] *See* Bolton, 410 U.S. at 200 and Bigelow, 421 U.S. at 823-824.

[44] 36 Stat. 825 (1910), as amended (codified at 18 U.S.C.A. §2421 (Supp. 1992)).

[45] *See* Michael Conant, Federalism, the Mann Act, and the Imperative to Decriminalize Prostitution, 5 Cornell J. L. & Pub. Pol'y. 99, 108, n.65 (noting that Congress amended the statute in 1945 and deleted the title "White Slave Traffic Act") (citing 62 Stat. 812).

[46] 36 Stat. 825 (1920).

Since 1913[47] the Mann Act has continuously been upheld as constitutional under the Commerce Clause,[48] but has not been successfully litigated before our highest court since World War II.[49]

The essential difference between the Mann Act and the CCPA is that the former was enacted to support and protect the policies of all of the states,[50] while the CCPA would specifically interfere with and undermine the authority of states to enforce and create their own policies.[51] The purpose of the Mann Act was to strengthen state laws and policies prohibiting prostitution and pandering, already enacted and enforced in all states at the time of its passage.[52] Further, all litigation challenging the constitutionality of the Mann Act centered on the Commerce Clause and not on the right to travel,[53] as the former doctrine had not been articulated to the extent that it has been today.[54] Since no state had a specific policy allowing pandering or prostitution, the issue of granting privileges and immunities to individuals engaged in those activities never arose. There were no affirmative policy decisions made by the states at the time of passage that conflicted with the law, and after passage, many states took it upon themselves to enact various forms of regulation of their own.[55] Conversely, states today that have chosen not to pass parental notification or consent

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[47] *See* Hoke v. United States, 227 U.S. 308 (1913).

[48] *See generally* Conant, *supra* note 44, for an excellent history of Supreme Court cases upholding the Mann Act.

[49] Cleveland v. United States, 329 U.S. 14 (1946).

[50] The Mann Act was originally drafted to protect the "victims" of prostitution—the women themselves who were being taken, presumably unawares or under duress, across state lines to engage in unlawful sex. Ironically, it was these same women who were ultimately the target of prosecutions. *See generally* Marlene D. Beckman, The White Slave Traffic Act: The Historical Impact of a Criminal Law Policy on Women, 72 Geo. L.J. 1111 (1984). Likewise, the CCPA, according to its legislative history, is aimed at the "traffickers," and is supposed to protect the minor girls from being kidnapped and forced to undergo a "potentially fatal abortion" at "the hands of strangers." 145 Cong. Rec. H. 3868 (daily ed. June 30, 1999).

[51] We will return to this idea in our discussion of Congress's inability to pass a parental notification law of its own.

[52] *See, e.g.*, Hoke, 227 U.S. 308.

[53] *See* Conant, *supra* note 44, at 111.

[54] This raises another fundamental distinction between the two laws: neither prostitution nor pandering is a constitutionally protected activity.

[55] With the passage of the model Standard Vice Repression Law by Congress in 1919, every state and most municipalities immediately began to heavily regulate prostitution. *See* Kate DeCou, Women in Prison: U.S. Policy on Prostitution: Whose Welfare is Served?, 24 N.E.J. on Crim. & Civ. Con. 427, 432 (1998).

laws have done so by active choice.[56] A legislature's silence on the question should not be taken as a lack of interest in the issue, but rather as an affirmative grant to citizens within (both resident in and visiting) the state to make their own choices regarding parental involvement.[57] The federal government does not have the authority to usurp from individual states the power constitutionally to regulate matters that the Supreme Court has relegated to the states.[58]

Federal statutes limiting interstate travel have been upheld only when they narrowly governed "illicit" behavior. Several other federal laws regulate citizens through mechanisms similar to those employed by the Mann Act. These statutes serve to protect state policies constitutionally[59] and are thus distinguishable from the case presented by the CCPA. According to the Supreme Court, the laws specifically and narrowly prohibit "interstate travel when it is done with an illicit intent."[60] In U.S. v. Burton,[61] the Eighth Circuit upheld the constitutionality of a federal statute prohibiting the illegal transportation of firearms by convicted felons.[62] The court held that a citizen's right to travel is subordinate to the Congressional right to regulate interstate commerce *when the travel involves the use of an interstate facility for illicit purposes.*[63] Twenty-three years later, that same court held that a federal statute prohibiting travel for completion of a

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[56] For example, it is questionable today whether the Mann Act could be applied by the federal government to prohibit prostitution in Nevada, since that is obviously an affirmative act by the state government to allow prostitution within its borders. A woman traveling to Nevada to become a prostitute would have a good legal leg on which to stand under the newly redefined breadth of the right to travel under Saenz, and the Mann Act might be inapplicable under that holding. Thus, the right to travel cases, combined with the newly narrowly defined Commerce Clause, might pose a problem to a Congress that tried to regulate intrastate morality.

[57] *See* Brilmayer, *supra* note 36, at 891 (a state which is silent on issues regarding abortion might be indifferent to the outcome of a woman's decision to end her pregnancy or not, but not to the decision making process, and is decidedly and purposefully leaving that process up to the woman herself).

[58] Part III of this paper will evaluate this assertion in depth in light of current Commerce Clause jurisprudence and the ability of the federal government to assist states in regulating outside of their borders.

[59] *See, e.g.*, 18 U.S.C. § 2423(b), Travel with Intent to Engage in a Sexual Act with a Juvenile. *See* U.S. v. Brockdorff, 992 F.Supp. 22 (D.D.C. 1997) for application of the law, discussed *infra*.

[60] Brockdorff, 992 F.Supp. at 25.

[61] 475 F.2d 469 (8th Cir. 1973), cert. denied, 414 U.S. 835 (1973).

[62] *See* 18 U.S.C. §1202(a)(1). This section was repealed in 2000, perhaps under fire from the gun lobby.

[63] Burton, 475 F.2d at 471 (emphasis added).

murder-for-hire[64] was constitutional since the travel was conducted with the *intent to commit a serious crime*.[65] The District Court for the District of Columbia followed this reasoning in U.S. v. Brockdorff.[66] That case involved a statute forbidding interstate travel with the intent to enter into sexual relations with a minor, [67] and the court held that while the right to travel is indeed a fundamental right, it is not impermissibly burdened by a law proscribing travel with an illicit purpose.[68]

None of these statutes attempts to enforce one state's laws against another. The activities proscribed by these laws are crimes in every state, and therefore, the travel will result in a crime in every state. In the case of the CCPA, the restricted travel would culminate in a completely lawful activity protected by the Constitution of the United States. According to the Supreme Court, no government, state or federal, can completely outlaw abortion in any state.[69] The CCPA is, therefore, of an inherently different quality than these other federal laws, since murder-for-hire, for example, is not a constitutionally protected activity. The CCPA contains no actual requirement that either the minor or the person accompanying her have an intent to evade state law, only that the minor intend to have an abortion. The reasoning in each of the cases cited above rested upon the per se illicit purposes for which the defendants were traveling. Therefore, they are all distinguishable from the case presented by the CCPA, and there remains no precedent granting the federal government the authority to curtail so blatantly the fundamental rights of law-abiding citizens.

In addition, while the prong of Saenz that is applicable to the CCPA rests on Article IV Privileges and Immunities Clause grounds, the Supreme Court reached its decision in that case by reasoning from the Fourteenth Amendment's Privileges and Immunities Clause.[70] The Court determined that the right to travel was one of national citizenship that no state could abridge without surviving strict scrutiny. However, the Court implied that although the language of the amendment is specific to state laws, it reaches

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[64] 18 U.S.C. § 1958(a).

[65] U.S. v. Delpit, 94 F.3d 1134 (8th Cir. 1996) (emphasis added).

[66] 992 F.Supp. 22 (D.D.C. 1997).

[67] 18 U.S.C. § 2423(b).

[68] Brockdorff, 992 F.Supp. at 25.

[69] *See* Roe, 410 U.S. 113. *See also* Casey, 505 U.S. 833 (holding that a state may not "unduly burden" a woman's access to abortion, but upholding the constitutionality of parental consent laws generally) and Stenberg v. Carhart, 530 U.S. 914 (2000) (affirming the necessity of inclusion of a health exception for the mother in late-term abortion laws).

[70] Saenz, 526 U.S. at 502-503. ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States...").

the federal government as well. In its discussion of Congress' powers under Section Five of the Fourteenth Amendment, the Court remarked, "Although we give deference to congressional decisions and classifications, neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment."[71]

Saenz holds then that under the Fourteenth Amendment a state may not abridge the absolute right of a citizen to travel between states for licit purposes, and more importantly in this context, Congress may not pass a law allowing a state to do so.[72] It is a plausible argument then, that Congress could not abridge such rights on its own either. It would only make sense that the rights of national citizenship must be protected by the nation's government.[73]

IV. THE CCPA REPUDIATES IMPORTANT NOTIONS OF FEDERALISM ARTICULATED IN THE CONSTITUTION

A. Congress could not draft a federal parental notification law under the Commerce Power in the wake of Lopez and Morrison

A recent string of cases defines the Supreme Court's current assessment of the limits of Congress' Commerce Power. The most influential of these is United States v. Lopez.[74] In that case Chief Justice Rehnquist laid out three alternative criteria for judging whether a legislative act falls under the Commerce Clause. First, relying upon such cases as United States v. Darby[75] and Heart of Atlanta Motel, Inc. v. United States,[76]

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[71] *Id.* at 508.

[72] *See id.*

[73] *See* Kreimer, *supra* note 22, at 505-506. ("Regardless of the vagaries of state law, the United States citizen was protected against "abridgments of the privileges or immunities" of national citizenship.")

[74] 514 U.S. 549 (1995) (declaring unconstitutional the Federal Gun Free School Zone Act, which made it a federal offense to knowingly possess a firearm in a school zone, on the grounds that it was beyond Congress's Commerce Clause power). *See also* Andrew M. Siff, United States v. Lopez and the Child Support Recovery Act of 1992: Why a Nice Idea Must Be Declared a Casualty of the Struggle to Save Federalism 6 Cornell J.L. & Pub. Pol'y 753, 760 n.46 (discussing reactions to Lopez, including Judge Alex Kozinski's comment that the Commerce Clause is no longer the "Hey, you-can-do-whatever-you-feel-like Clause," citing the introduction to Volume Nineteen, 19 Harv. J.L. Pub. Pol'y 1, 5 (1995)).

[75] 312 U.S. 100 (1941) (upheld Fair Labor Standards Act of 1938, which set minimum wages and maximum hours for employees engaged in production of goods for interstate commerce).

[76] 379 U.S. 241 (1964) (upheld the public accommodations provisions of the Civil Rights Act of 1964, under the Commerce Clause, as applied to a motel that discriminated against African Americans).

the Court determined that Congress may regulate the use of the channels of commerce.[77] Second, the Court held "Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities."[78] Third, Congress has the power to regulate activities having a substantial relation to interstate commerce.[79] The Court in Lopez held that the Gun Free School Zones Act[80] did not meet any of these criteria.[81] Justice Rehnquist used the same reasoning five years later in U.S. v. Morrison.[82] He followed his own precedent in determining the unconstitutionality of the Violence Against Women Act[83] so far as it provided a private civil remedy for victims of sexual violence against their assailants.[84] The Court decided that gender motivated crimes were not, "in any sense of the phrase" economic activities[85] that could justify congressional intervention under the Commerce Clause. Justice Rehnquist warned in Lopez[86] and again in Morrison[87] that under the Government's urged expansive reading of the Commerce Clause, Congress would be permitted even to regulate "family law (including marriage, divorce, and child custody)." It is not difficult to add "abortion" or simple "parental notification or consent" to the list of disfavored regulations suggested by the Chief Justice.

Through these cases, Justice Rehnquist may have inadvertently backed himself into a precedential corner. His Court may have little choice but to invalidate a federal act mandating national parental notification. While Congress has acted to protect abortion providers,[88] the only way in

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[77] *See* Lopez, 514 U.S. at 558.

[78] *Id.*

[79] *See Id.*

[80] 18 U.S.C. 922(q)(1)(A) (1988 ed., Supp. V).

[81] *See* Lopez, 514 U.S. at 568.

[82] 529 U.S. 598, 608-09 (2000).

[83] 42 U.S.C.A. § 13981

[84] Morrison was decided on both Commerce Clause and Fourteenth Amendment, Section Five grounds, although neither was accepted by the court as sufficient reasoning for upholding the law. I will not discuss Section Five grounds at length in this paper, since I do not believe that such grounds apply to the CCPA. For Supreme Court discussion of Section Five analysis, *see* City of Boerne v. Flores, 521 U.S. 507 (1997). *See also* Roger C. Hartley, Alden Trilogy: Praise and Protest 23 Harv J.L. & Pub. Pol'y 323, 351-354 (Spring, 2000).

[85] Morrison, 529 U.S. at 613.

[86] 514 U.S. at 564.

[87] 529 U.S. at 613.

[88] *See* the Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C.A. §248 (2000) which has been declared within the realm of the Commerce Clause most recently by

which Congress has thus far been able to restrict access to abortion has been through the refusal to allocate federal funds for abortions.[89] It is a fair assumption that if Congress believed a federal parental notification or consent law would pass constitutional muster, conservative members would draft legislation that did as much, instead of attempting to pass the CCPA, which purportedly only helps states enforce their own existing laws. While often disheartening and frustrating for the pro-choice movement, the Supreme Court has clearly left regulation of abortion to the states.[90] Ironically, this allocation of regulatory power to the states by the Burger and Rehnquist courts would ultimately doom a similarly conservative Congress' chance of prevailing in a constitutional challenge to a federal parental notification law.[91]

Interestingly, just as Congress could probably not pass a federal parental notification law, individual states would have difficulty passing a CCPA-like law applicable only to their own citizens. Not only would the above analysis apply regarding the right to travel, but such a law would also be a direct violation of the Commerce Clause; states do not have the power to regulate interstate commerce.[92]

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the Third Circuit in U.S. v. Gregg, 226 F.3d 253, petition for cert. filed, (3d. Cir. 2000). It is unclear how (and whether) the Supreme Court will rule on this law, since the Court has denied certiorari seven separate times. See Gregg, 226 F.3d at 261, for a summary of federal courts' prior adjudication of the law. This law is easily distinguishable from a federal parental notification law since FACE deals primarily with an activity that has a substantial effect on interstate commerce—violence directed toward the clinics themselves. The link between parental notification and commerce is certainly a more tenuous one. Parental notification could arguably fall within the auspices of pure family law. Such matters have always been reserved to the states. *See* discussion *infra*, p.18, on the Child Support Recovery Act.

[89] *See, e.g.*, Harris v. McRae, 448 U.S. 297 (1980) (holding that there is no constitutional right to Medicaid funding for abortions). *See also*, David B. Kopel & Glenn H. Reynolds, Taking Federalism Seriously: Lopez and the Partial Birth Abortion Ban Act, 30 Conn. L. Rev. 59 (1997) discussing Congress's questionable ability to regulate abortion at all after Lopez. The authors raise the question specifically in terms of the federal "Partial Birth Abortion Ban Act" which was twice vetoed by President Clinton and both times was nearly passed by Congressional override. It is likely that the Bill will surface again under a Bush administration, and that it will not be vetoed by the new President. Therefore we will probably see the resolution of this issue in the courts in the next several years. In his first days in office President Bush issued an executive order to withhold family planning funds from overseas organizations that perform abortions. *See* Frank Bruni & Marc Lacey, The New Administration: President Bush Acts to Halt Overseas Spending Tied to Abortion, N.Y. Times, Jan. 23, 2001, at A1.

[90] *See* Roe, 410 U.S. at 164.

[91] Justice Kennedy's concurrence in Lopez stresses that the Commerce power does not extend to matters of traditional state concern (in that case, education), and that the Act in question foreclosed states from exercising their own judgment in a way that went beyond regulation of commerce. Lopez, 514 U.S. at 575-83.

[92] *See* Kreimer, *supra* note 22 at 496-97, 500.

B. Congressional Power to Help States Regulate Outside Their Borders

If Congress cannot pass a federal parental notification act, the only way to achieve a similar result is effectively to compel states to honor the notification statutes of their sister states and to disregard their own policies against such restrictions. The law would depend on the receiving states to "turn in" the offenders, since it is unlikely that federal agents will lie in wait at various clinics, or set up check posts at state borders searching for suspicious looking teenage girls traveling with a "non-parent." The way in which Congress usually assists states in achieving extraterritorial control of their residents is through use of the Full Faith and Credit Clause,[93] and proponents of the CCPA might argue that even though it is not explicit in this regard, the law is a valid exercise of that congressional power. However, in truth, the law represents an egregious seizure of the right of one state to maintain policies counter to another's—a seizure that does not fit within the province of Full Faith and Credit Clause jurisprudence and one that is not protected by the Constitution.[94]

The Full Faith and Credit Clause, as a means by which Congress may effectively aid states in extraterritorial regulation, simply does not apply to the scheme proposed in the CCPA. Justice Ginsburg recently elaborated on the breadth of the clause's influence in Thomas v. General Motors Corporation.[95] She asserted that the clause does not "compel a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate. . . . Regarding judgments, however, the full faith and credit obligation is exacting."[96] For example, if the CCPA were drafted in a way to make the decision of a judge final in a judicial bypass proceeding,[97] the Full Faith and Credit Clause

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[93] "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Law prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof." U.S. Const. Art. IV, § 1 ("Full Faith and Credit Clause").

[94] In addition, if Congress attempted to force the states to conduct "pregnancy checks," anti-commandeering principles would likely be implicated. *See* Printz v. United States, 521 U.S. 898 (1997) (Congress cannot force state agencies to oversee the administration of federal gun control legislation. Federal laws must be executed by federal executive agencies, not states).

[95] 522 U.S. 222, 232 (1998).

[96] *Id.* (citing Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 501 (1939)).

[97] The Court has held that if a state statute requires a minor to obtain parental consent it must also provide the option for her to appear before a judge and plead her case to him or (rarely) her. *See* Casey, 505 U.S. at 899 (citing Ohio v. Akron Ctr. for Reproductive Health, 497 U.S. 502, 510-19 (1990) (Akron II) (O'Connor, J. concurring in part) and Bellotti v. Baird, 443 U.S. 622, 643-44 (1979) (Bellotti II) (plurality opinion).

might apply, since that would constitute a "judgment" within Justice Ginsburg's reigning Thomas definition.

Several recent acts of Congress have utilized either the Full Faith and Credit Clause enforcement power or the Commerce Clause power seemingly to bring historically state-monitored activities within federal jurisdiction. This has been especially significant in the family law sphere. The Parental Kidnapping Prevention Act[98] (PKPA) requires that states give full faith and credit to any custody determinations made by sister states even if their laws would dictate a different outcome in the original dispute. Its purpose is to resolve complicated questions of jurisdiction in custody hearings so that children are not made pawns by forum-shopping parents unhappy with one state's resolution of the issues. The law differs substantially from the CCPA. It refers specifically to final judgments made by a court[99] and therefore falls within the auspices of Congress' Full Faith and Credit Clause power. Again, the CCPA does not require a judgment by a court in any jurisdiction before it forces its effects onto a receiving state and punishes the traveling individuals.[100]

Another reason it would be difficult for State A to pass its own law prohibiting State B from providing abortions to State A residents is the public policy exception to the Conflict of Laws doctrine. The doctrine of the public policy exception is well-recognized in the Restatement (Second) of the Law of Conflicts of Laws, which provides:

> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied . . . unless . . .

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[98] 28 U.S.C. § 1738A.

[99] 28 U.S.C. § 1738A(a). Custody judgments are not actually final until the child in question reaches age of majority. Parties may seek to modify until that time, so in this context, a final judgment refers to a judge's resolution of the questions posed at the time the parties were last in court.

[100] Similarly, the Child Support Recovery Act (CSRA), 18 USCS § 228, requires state courts to recognize child support orders from other states' courts. This law was not passed pursuant to the Full Faith and Credit Clause, but to the Commerce Clause like the CCPA, and it has been deemed constitutional under this congressional power. *See, e.g.*, United States v. Bongiorno, 106 F.3d 1027 (1st Cir. 1997). The law was passed for many of the same reasons propounded by supporters of the CCPA. Congress doubted the ability of the states to enforce their child support decrees extraterritorially and hoped that the CSRA would "prevent delinquent parents from making a mockery of State law by fleeing across State lines to avoid enforcement action by State courts. . . ." *Id.* at 1030 (quoting 138 Cong. Rec. H. 7324, H7326 (daily ed. Aug. 4, 1992) (statement of Rep. Hyde)). The CSRA would probably pass muster under the Commerce Clause, but unlike the CCPA, it only punishes individuals who also break state laws, and it does not impinge upon a fundamental right. For a discussion of the CSRA's constitutionality under current Commerce Clause jurisprudence, *see* Deborah Jones Merritt, Reflections on U.S. v. Lopez: COMMERCE!, 94 Mich L. Rev. 674, 722 (Dec. 1995). As noted above, because of the right to travel doctrine imposed so vigorously on the states it is highly unlikely that individual states would be able to pass a local version of the CCPA. *See* discussion *supra* pp 411-14.

> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue . . . .[101]

The fact that State B allows resident minors to receive abortions without restrictions certainly speaks to an affirmative public policy decision[102] and one that courts in State B might well recognize in determining the application of State A's laws in its own courts.[103] Doe v. Bolton would mean nothing if a state allowing abortions generally to its own residents was not allowed to provide the procedure to residents of a stricter State A if it so chose. Generally then, a state can decide not to apply the laws of a home state if those laws run against the important policy of the forum state.

The public policy exception does not explicitly bind Congress, as it is only state-made common law. However, it has historically informed the bounds of federal enforcement of the Full Faith and Credit Clause. One exemplary case in which the Supreme Court recognized the interplay between the two doctrines is Pacific Employers Insurance Co. v. Industrial Accident Comm'n:

> [W]e think the conclusion is unavoidable that the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events.[104]

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[101] Restatement (Second) of Law of Conflicts of Laws § 187(2)(b) (1988).

[102] *See* Brilmayer, *supra* note 36, at 891. The public policy exception to the Conflict of Laws doctrine has been invoked by states and by Congress in the debate around same sex marriages. The Defense of Marriage Act (DOMA), 28 U.S.C. § 1738C (1999), codifies Congress's reminder to the states that the exception exists and claims that states are not compelled to recognize same sex unions from other states. The Supreme Court would probably uphold the constitutionality of DOMA under the exception. As one scholar has observed "[T]he conclusion that a state can invoke its public policy to refuse to recognize a same-sex union entered into in another state, if the home state has a sufficiently strong policy against recognizing such unions as marriages, is nearly inescapable." Richard S. Myers, Same Sex "Marriage" and the Public Policy Doctrine, 32 Creighton L. Rev. 45, 55 (1998) (citing Andrew Koppelman, Same-Sex Marriage, Choice of Law, and Public Policy, 76 Tex. L.Rev. 921, 922 (1998). This might be another instance in which pro-choice groups would be best served by approaching the Court using its own rhetoric. *See* discussion *supra* p.13, on the Commerce Clause.

[103] For a discussion of the general applicability of the exception, *see* Larry Kramer, Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception, 106 Yale L.J. 1965, 1971-77 (1997).

[104] Pacific Employers Insurance Co., 306 U.S. at 502.

In the case of the CCPA, however, Congress would effectively decide that in the realm of abortion regulation the states do not possess the autonomy to make those decisions on their own.

In addition, a state's policy does not necessarily include only a desire to extend abortion rights to the state's own citizens, but to residents of other states as well. It is not uncommon for state-subsidized clinics to advertise the lenient state policy widely[105] and to encourage pregnant teenagers from surrounding states to cross the border. Indeed, it is part of the policy of the state that pregnant minors feel comfortable and safe by doing so. That purpose is seriously frustrated by the CCPA if the girls are forced to cross state lines by themselves. Further, part of the state's intention could be to allow adults to help and support young women without worrying about the legal ramifications of their actions. Certainly, within a state that does not require parental notification, the law imagines that a non-parent adult will play some role in the girl's decision to enter the state for an abortion. The CCPA frustrates this goal as well, and leaves both well-meaning adults and pregnant teenagers without recourse.[106]

V. CONCLUSION

Abortion regulation is taking a new and frightening turn. No longer satisfied with the degree to which the states are constitutionally able to monitor their citizens, Congress has taken it upon itself to propose a plainly unconstitutional solution. The Supreme Court has been clear in its cases regarding citizens' right to travel. In cases explicitly dealing with abortion rights as well as more general decisions construing the Privileges and Immunities Clause, the Court has unequivocally protected the rights of state residents to travel interstate for a host of purposes. The CCPA would undermine these decisions. The importance of safeguarding the rights of individual states is not frequently the position taken by abortion rights advocates. However, in this case it is essential that state policies disapproving of parental notification are upheld and recognized by the federal government. The Supreme Court has been clear in its allocation of abortion law to the states, and the CCPA would represent a clear usurpation of that authority.

The CCPA purports to save young women from the dangers of lascivious, coercive, older men, yet the congressional records provide absolutely no evidence to support even the claim that "a majority of school-

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[105] *See* 145 Cong. Rec. H. 5099, 5103 (daily ed. June 30, 1999) (Statement of Rep. Ros-Lehtinen) for examples of clinic advertisements in yellow pages stressing no parental consent requirements and no age restrictions.

[106] Since the statute would not prohibit the girl from traveling interstate alone to get an abortion, we must wonder a bit at the motivation of the lawmakers who claim to have the child's interest at heart, yet would have her drive home alone after a surgical procedure.

aged girls who become pregnant were impregnated by adult males."[107] Further, there are currently state and federal laws proscribing statutory rape and kidnapping that protect teenage girls. If the purpose is to deter that behavior, stricter enforcement of those laws would seem to offer a viable alternative.

But the CCPA is not concerned with the protection of these pregnant girls. It is concerned with the protection of their fetuses. This law will prevent grandparents, sisters, and clergy from supporting and helping these teenagers get through an already trying time. It will force girls to go through the decision to have an abortion alone and to travel sometimes hundreds of miles by themselves. A law sincerely intended for the protection of young women would certainly not dictate this result and we must continue to fight against its passage.

[107] 145 Cong. Rec. H. 5099, 5101 (daily ed. June 30, 1999) (Statement of Rep. Jackson-Lee).